No. 89-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM R. FISCHER, The Estate of BETTY L. FISCHER, MONTFORD R. FISCHER and BONITA G. FISCHER,
Petitioners,

v.

NWA, INC., NORTHWEST AIRLINES, INC. and SIMMONS AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS NWA, INC. AND NORTHWEST AIRLINES, INC.

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Respondents NWA, Inc. and Northwest Airlines, Inc. (collectively "Northwest")[1] respectfully request that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. The opinion is reported at 883 F.2d 594. (Pet. A-1).

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[1] Northwest Airlines, Inc. is a wholly-owned subsidiary of NWA Inc. Holding Company, a Delaware Corporation, incorporated on March 6, 1984, which is in turn the wholly-owned subsidiary of Wings Holding Corp., a Delaware Corporation, incorporated on February 23, 1989. Northwest Airlines, Inc. has several subsidiary corporations which are wholly-owned.

STATEMENT OF THE CASE

This case arises from the termination by Northwest of a redundant, noncompeting vendor pursuant to a contract which permitted either party to terminate without cause. It does not involve or even implicate competition in the airline industry, alleged monopolies, alleged conspiracies or the application of any legal doctrines other than well settled law.

The large national airlines operate hub and spoke systems which rely on frequent banks of connecting flights at major "hub" airports to provide passengers with a much greater choice of services than if flights were simply provided on a point-to-point basis. Since many U.S. communities do not generate traffic sufficient to support frequent service by large jet aircraft, the national airlines contract with smaller, commuter airlines to provide the service on such "spoke" routes. In the typical arrangement the commuter airline operates piston or turboprop aircraft and utilizes the name (*e.g.*, "Northwest Airlink" or "Republic Express"), livery and computer reservation code of the national airline.

Prior to the merger of Republic Airlines ("Republic") into Northwest on October 1, 1986, Northwest operated its only domestic hub at Minneapolis-St. Paul while Republic operated domestic hubs at, *inter alia*, Minneapolis-St. Paul and Detroit. Republic had been procuring its "Republic Express" connecting service at Detroit from Simmons Airlines, Inc. ("Simmons") since 1984 under an agreement which could not be terminated until October 29, 1988 at the earliest.

Fischer Bros. Aviation ("FBA") had been operating as "Allegheny Commuter" at Detroit since 1984 under an agreement with USAir. As USAir decreased its operation at Detroit in the latter part of 1985, FBA began to look for a new national airline contract. FBA approached several national airlines. Northwest, which had not previously relied on a commuter vendor at Detroit,

expressed an interest. FBA terminated its agreement with USAir and entered into an agreement with Northwest at the end of 1985. In pertinent part, the agreement provided that: (i) FBA would have the exclusive right to operate as Northwest Airlink for all flights originating in Detroit unless it declined that right; (ii) because of the relatively low level of Northwest activity at Detroit, Northwest would subsidize FBA in the amount of approximately $100,000 per month in additional joint fare revenues; and (iii) *either party could terminate the agreement unilaterally, without cause, by giving six months notice.* (Pet. A-4).

In January, 1986 Northwest and Republic reached agreement on an acquisition and merger. In February, FBA began service as Northwest Airlink at Detroit. After the merger, however, Northwest would have two Northwest Airlinks each at Detroit and Minneapolis-St. Paul, providing overlapping service on many spoke routes. While Northwest told all vendors that final plans could not be made until the merger was approved by the U.S. Department of Transportation ("DOT"), it also made clear to the Northwest and Republic commuter vendors that they would have to reach accommodations among themselves or else Northwest would have to make some difficult choices.

The Northwest and Republic commuter venders at Minneapolis-St. Paul reached such an accommodation. FBA and Simmons did not achieve similar success in their negotiations. Why they did not reach agreement is immaterial, but it left Northwest in a position where it would have *two* Northwest Airlinks at Detroit starting on October 1, 1986, the date the merger became operationally effective. On September 24, Northwest gave FBA the six month notice of termination permitted under their agreement.[2]

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[2] Petitioners persist in using selected excerpts from the record to support *ad hominem* characterizations of certain Northwest offi-

From October 1, 1986 through March 24, 1987, both FBA and Simmons operated as Northwest Airlinks at Detroit providing connecting air services that were in large part redundant. Nonetheless, the merged Northwest-Republic operations at Detroit provided a financial bounty for FBA. Rather than providing connections for 40 daily Northwest flights, it was now providing connections for over 300 daily Northwest (including former Republic) flights. Traffic on FBA increased by 30% as a result of the merger. (Pet. A-6).

Two other points with respect to FBA's operation merit emphasis. First, *FBA did not compete with Northwest.* FBA was a vendor of connecting services to Northwest, not a competitor. FBA provided these services using Northwest's name, livery and computer reservation code and was compensated by Northwest. Although FBA was free to do whatever else it wanted to do at Detroit so long as it did not hold such other services out as "Northwest Airlink," its only operation at Detroit was pursuant to the Northwest contract. Assertions to the contrary in the Petition are absolutely incorrect.[3] Secondly, although

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cials involved in the termination. (Pet. 7-9). For example, if deposition testimony was corrected to reflect facts that Petitioners find distasteful, they view that as an admission against interest by Northwest without noting that Petitioners did not seek further depositions in any such instance as they were entitled to do. Suffice it to say that the district court spent considerable effort sorting through these allegations and found that even taking them in the light most favorable to Petitioners, they were completely insufficient to overcome the compelling inference of independent action by Northwest in the matter. (Pet. B-10 to B-23).

[3] The Northwest Respondents remain incredulous that Petitioners would argue that FBA was a competitor of Northwest, an argument for which Petitioners rely solely on statements made during the DOT acquisition proceeding which Petitioners take out of context and misrepresent.

Briefly stated, there is no rational reason why Northwest would compete with itself by competing with a Northwest Airlink which

the Northwest-Republic merger had an immaterial effect on airline market shares at Detroit, that was the only hub served by FBA—to the extent that airline market shares at Minneapolis-St. Paul are brought into consideration, that is an airport with which FBA had absolutely no economic involvement as a vendor or otherwise.

FBA's agreement with Northwest terminated on March 24, 1987. The principals of FBA, *i.e.*, the Petitioners herein, took two steps soon thereafter. First, they sold FBA to Midway Airlines for $2.235 million but not before they had first transferred FBA's putative claims against Northwest and Simmons to themselves for a total consideration of $15,000. *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144 (D. Minn. 1987) (Symchych, Mag.).[4] Secondly, they instituted the action below against Northwest and Simmons.

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was providing contract connecting air service for Northwest. Nonetheless, Petitioners state that "[a]s pointed out by Judge Larson, Fischer Bros. presented substantial evidence that it was a competitor of Northwest, including repeated statements by Northwest to the DOT to the effect that Northwest was in competition with commuter carriers such as Fischer Bros., and that competition from commuter carriers was a ground for approving Northwest's acquisition of Republic. 883 F.2d at 604." (Pet. 19-20; *see also* Pet. 5 and 25).

Senior District Judge Larson (sitting by designation) did *not* find in his dissent that there was "substantial evidence" that such competition existed. The only "evidence" he cited, and the only "evidence" proffered by FBA, was an excerpt from a Northwest filing at the DOT as well as an excerpt from the DOT order approving the acquisition. The point that both Northwest and the DOT were making in those excerpts, and it was a point made without any reference to FBA, was that Northwest received a minimal amount of competition from *unaffiliated* commuter airlines or commuters affiliated with *other* national airlines. (Ct. App. J.A. 3676-78 and 5213). There was no suggestion, and could not have been any, that Northwest competed with its own Northwest Airlink vendors, either as a general proposition or specifically with regard to FBA.

[4] Although it is not relevant to any issue other than damages, Petitioners' introductory salvo that "Fischer Bros. is out of busi-

The complaint embodied a variety of antitrust, fraud and tortious interference claims. The antitrust claims are the only ones still being pursued by Petitioners. Although those claims were stated in many different ways at various stages of the proceeding, they basically came down to: (i) a claim that the Northwest-Republic merger created a monopoly; and (ii) a claim that Northwest and Simmons conspired to terminate the FBA agreement. Petitioners' primary remedy for these alleged antitrust violations was to preserve the Northwest-FBA Airlink agreement, either directly by injunctive relief (which the district court denied at the outset) or indirectly by awarding Petitioners damages in the amount of FBA's lost profits had FBA continued to be a Northwest Airlink enjoying the increased business provided by the merger. (Ct. App. J.A. 33, 4223-25 and 4263-65).

After extensive discovery, the district court (per Chief Judge Alsop) granted Respondents' motions for summary judgment.[5] The district court held that the claims relative to the Northwest-Republic merger were precluded by the prior DOT approval of the transaction and the collateral attack doctrine established by the Court in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) ("*City of Tacoma*") and *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) ("*Marine Terminal*"). (Pet. B-7 to B-9). The district court did not reach Northwest's additional argument that FBA lacked the requisite antitrust injury—indeed, FBA's sole concern was that it was not being allowed to participate in the increased business

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ness" (Pet. 11) is incorrect. The entirety of the FBA operation was acquired by Midway Airlines, moved to Chicago and is now operating on a substantially larger scale than when Petitioners owned the company.

[5] *Fischer v. NWA, Inc.*, No. 3-87-106 (D. Minn. June 9, 1989) (Pet. B-1).

resulting from the merger. As to the conspiracy claims the district court held that the evidence of record, most of which was "inconsistent with or at least neutral" with respect to the claimed conspiracy, failed to overcome the inference that Northwest had engaged in unilateral action when it terminated the FBA agreement. (Pet. B-10 to B-17). The district court also noted that this same analysis would lead to the conclusion that FBA lacked antitrust injury as a result of the alleged conspiracy, *i.e.*, "the alleged injury was caused by the termination, and if such termination was the result of a unilateral decision by Northwest, then there is no concerted activity for which FBA has an injury." (Pet. B-16, n.13).

The court of appeals affirmed, although it chose to express its disposition of the antitrust claims solely in terms of standing. Following the antitrust standing doctrine established by the Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the court of appeals held that since FBA was neither a customer nor a competitor of Northwest, and since Northwest's ability to terminate FBA under the agreement was in no way enhanced by the alleged antitrust violations, FBA did not suffer antitrust injury. (Pet. A-10 to A-13).

REASONS WHY THE PETITION SHOULD BE DENIED

Summary of Reasons.

Synopsizing Petitioners' arguments, they urge grant of the writ because: (i) the court of appeals incorrectly held that FBA, a competitor of Northwest, did not have standing to challenge the anticompetitive consequences of the Northwest-Republic merger even though the termination of FBA's agreement was the product of Northwest's merger-induced monopoly as implemented directly and through a conspiracy between Northwest and Sim-

mons; (ii) this is an unjustifiably narrow reading of the competitor standing principles expressed in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and (iii) this reflects a split among the circuits on the application of the *Cargill* principles. Almost as an aside, Petitioners ask for review of the district court's reliance on the collateral attack doctrine even though that doctrine was not a basis for the court of appeals' decision.

Petitioners have misconstrued the record, the opinion below and even the current status of the law. The court of appeals reached the only result permitted by the overarching facts—the noncompetitive, vendor-vendee relationship between Northwest and FBA, the ability of either party to terminate on six months notice without cause, prudent reasons for Northwest to do so and the absence of any connection between those facts and the alleged "monopoly power" conferred on Northwest as a result of the merger.

In reaching that result, the court of appeals did not make new law or extend existing law. There is no issue of competitor standing—the issue upon which Petitioners primarily rely in urging the Court to grant certiorari—raised in this case. FBA was not a competitor of Northwest but a vendor of services which Northwest no longer desired to procure. The circuit conflict posited by Petitioners is thus simply irrelevant. Moreover, FBA's alleged injury—Northwest's termination of its contract to procure FBA's services—is not the antitrust injury required to establish standing.

As to the application of the collateral attack doctrine, the doctrine was correctly applied by the district court and, in any event, was not relied upon by the court of appeals. It is also an issue which will not arise again since DOT jurisdiction over airline acquisitions and mergers terminated as of January 1, 1989.

Petitioners Lack Antitrust Standing.

1. The court of appeals did not hold, as Petitioners would have it, that a competitor of a merged firm lacks standing when it is injured by anticompetitive consequences of a merger which go beyond the threat of additional competition created by the merger. The court made no findings with respect to the law on competitor standing. Rather, the court of appeals proceeded from the controlling fact that Northwest and FBA *were not competitors* in the first instance. (Pet. A-13). As discussed above, there is nothing in the record to suggest that they were competitors, and Petitioners' effort to assert otherwise is both inconsistent with the record and counterintuitive.

This case began because Northwest terminated an agreement under which it procured connecting services from FBA. FBA performed those services as if it were Northwest, with Northwest's name, livery and computer reservations code, and FBA received compensation for those services from Northwest in the form of a substantially larger share of the joint fare revenues than it otherwise would have received. If Northwest competed with FBA's (or any other commuter vendor's) Northwest Airlink service, it would have been competing, in effect, with itself. The court of appeals correctly recognized that absent a competitive relationship between Northwest and FBA, the issue presented by *Cargill* was not even raised.[6]

2. Much of Petitioners' argument below concerned the alleged monopoly power conferred on Northwest by

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[6] This obvious point was subsequently recognized by the district court in *International Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141 (D. Minn. 1989) (Magnuson, J.) (Pet. F-1, F-4 to F-16). Petitioners characterize the *International Travel Arrangers* decision as an effort to "force" a distinction between that case and the court of appeals' decision in this case (Pet. 25). The *International Travel Arrangers* decision was, in fact, no more than a restatement of the court of appeals' opinion.

the merger at Minneapolis/St. Paul. Finally sensitized to the fact that this argument does not carry any weight coming from a firm that had no relationship with Minneapolis/St. Paul whatsoever, Petitioners now focus on Northwest's alleged monopoly at Detroit. Their reluctance to focus solely on Detroit at the outset is understandable. Republic was the dominant airline at Detroit prior to the merger, and the addition of Northwest's relatively small market share to that position caused even the Justice Department, in the DOT merger proceeding, to concede that the merger did not create additional competitive concerns at Detroit.

Petitioners now argue that "Northwest was in the position of having to choose between regional carriers only because of its acquisition of Republic in order to obtain a monopoly at Detroit and other hubs." (Pet. 20). In other words, if Northwest had not merged with Republic there would not have been two Northwest Airlinks at Detroit and there would have been no need for termination of FBA. There are two problems with this argument. First, with or without a merger or other intervening event Northwest was free to terminate the agreement at any time on six months notice, as was FBA (and, indeed, FBA had entered into the Northwest agreement only after it had terminated its earlier agreement with USAir). Secondly, the fact that the merger provided a prudent business reason for the termination has nothing to do with antitrust injury. Whether Northwest had one or one thousand flights per day at Detroit, its ability to terminate the agreement remained constant.

3. Petitioners also argue that the alleged conspiracy between Northwest and Simmons was a means for implementing Northwest's monopoly power at Detroit. (Pet. 20). Once again, the conspiracy allegation assumes facts that are simply not present, namely, that Northwest and FBA were competitors and that Northwest did not have

the unilateral ability to terminate the agreement. Whether expressed as a matter of standing, as it was by the court of appeals (Pet. A-12 to A-13), or as a matter of both standing and failure of proof, as it was by the district court (Pet. B-10 to B-17), the point is the same—the termination of a redundant, noncompeting vendor under a contract which permits unilateral termination without cause does not rise to the level of an antitrust violation.

4. The circuit conflict posited by Petitioners is irrelevant. To the extent that the second and Fifth Circuits have expressed conflicting views of *Cargill*, their disagreement is regarding the proof of antitrust injury necessary for a competitor to preliminarily enjoin a proposed merger.[7] That is not an issue in this case. Moreover, antitrust standing in accord with the Court's holding in *Cargill* and its progeny is a particularly fact-sensitive inquiry. There is no "black-letter rule" which can be applied in each case, but instead "previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536-37 (1983). The case below was just such a case, as have been the recent standing cases in which the Court denied review. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989); *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir.), *cert. denied*, 110 S. Ct. 64 (1989); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988).

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[7] *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107-10 (2nd Cir.), *cert. denied*, 110 S. Ct. 64 (1989); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98-100 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988).

The Collateral Attack Doctrine Is Not At Issue.

1. Petitioners urge the Court to take review of an issue *not* decided by the court of appeals in this case but decided in favor of Respondent Northwest in another case presently pending in the district court,[8] *i.e.*, the application to DOT merger orders of the doctrine banning collateral attacks on fully adjudicated decisions of administrative agencies. While the issue was correctly decided in that case and might be addressed at a later point by the court of appeals in another docket, it is an issue which will not otherwise be heard from again since the underlying statutory authority expired as of January 1, 1989 and mergers in the airline industry are no longer subject to DOT review and prior approval.[9]

2. Petitioners do not appear to question the general application of the collateral attack doctrine expressed in *City of Tacoma* and *Marine Terminal* to DOT orders under former Section 408 of the Federal Aviation Act.[10] They argue, instead, that because the DOT did not grant Northwest broad immunity from the antitrust laws under a different provision of the Federal Aviation Act—immunity which Northwest did not seek in the first instance —the application of the collateral attack doctrine somehow results in an unintended grant of such immunity.

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[8] *International Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141 (D. Minn. 1989) (Pet. F-1).

[9] The merger of Northwest and Republic had been approved by the DOT pursuant to the antitrust standard of former Section 408(b)(1) of the Federal Aviation Act, 49 U.S.C. 1378(b)(1) (repealed 1989). Section 408 was terminated effective January 1, 1989 pursuant to the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3(c)(7), 98 Stat. 1703 (1984).

[10] The Second Circuit has also held that an issue decided in a Section 408 administrative proceeding may not be relitigated in a district court under a different statutory rubric. *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 645-46 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986).

The answer is, as the district court noted in *International Travel Arrangers v. NWA, Inc.*, that "[t]he court need not expose the decision of the DOT to challenge in order to fulfill the purposes of [Section 408]. The availability of remedies for post-merger anticompetitive activities insures that the parties involved will not be able to misbehave with impunity. On the other hand, the parties should not be subject to fear that DOT approval will be overturned and the acquisition undone." (Pet. F-12 to F-13).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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